Editor's note: 88 I.D. 643

FELDSLITE CORPORATION OF AMERICA

IBLA 79-362 Decided July 15, 1981

Appeal from decision of the Oregon State Office, Bureau of Land Management, declaring a quartz millsite location abandoned and void. OR MC 3408 (Wash).

Reversed and remanded.

1. Federal Land Policy and Management Act of 1976: Assessment Work -- Mining Claims: Millsites

   The failure of a holder of a millsite claim which has been properly recorded under 43 U.S.C. § 1744(b) (1976) to file an annual notice of intention to hold the millsite is a curable defect and the millsite may not be deemed to have been abandoned absent a failure to comply with a notice of deficiency.

APPEARANCES: W. R. Matthews, President of Feldslite Corporation of America, for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Feldslite Corporation of America appeals from the decision of the Oregon State Office, Bureau of Land Management (BLM), dated April 4, 1979, declaring the Feldslite Quartz Millsite Location, OR MC 3408 (Wash), which had been recorded with BLM on November 8, 1977, to have been abandoned because of a failure to file an annual assessment statement or notice of intention to hold the claim prior to December 31, 1978, as required by the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1782 (1976), and 43 CFR 3833.2-1. 1/

[1] At the outset, we must note that the State Office consistently referred to appellant's millsite claim as a mining claim. While millsite claims are initiated under section 15 of the General Mining Law of 1872, 17 Stat. 91, 96, as amended, 30 U.S.C. § 42 (1976), the question of whether a millsite is a "mining claim" or "mining location" has received varying answers through the years. 2/ Thus, millsites have been denominated "creature[s] of the mining laws," United States v. Werry, 14 IBLA 242, 250, 81 I.D. 44, 48 (1974), or,

1/ Subpart 3833 was revised effective Mar. 16, 1979, at 44 FR 9720 (Feb. 14, 1979). In this opinion, references to regulations are to the revised version. However, we note that the revision to cited regulations were generally editorial and did not change the substantive requirements in effect in 1978.
2/ Compare the syllabus from Hales and Symons, 51 L.D. 123 (1925), "A mill site is not a mining claim or location within the meaning of the United States Mining laws" with Eagle Peak Copper Mining Co., 54 I.D. 251 (1933), "A mill site appurtenant to a lode is a 'location' under the mining laws of the United States."

alternatively, "a part of the general mining laws." United States v. Cuneo, 15 IBLA 304, 322, 81 I.D. 262, 270 (1974). It has also been established that a millsite is a "claim" within the provisions of 30 U.S.C. § 38 (1976), which obviates the need to prove a formal location where a claim has been held and worked for a period equal to the statute of limitations of the State in which the land is located. See Dalton v. Clark, 18 P.2d 752, 754 (Cal. App. 1933); Cleary v. Skiffich, 65 P. 59 (Colo. 1901).

On the other hand, it is equally clear that a millsite is not a mining claim within the meaning of 30 U.S.C. § 28 (1976), which requires the performance of assessment work, Dalton v. Clark, supra, and thus is not subject to the provisions of 30 U.S.C. § 28b (1976) which prescribes procedures for the deferment of performance of assessment work. Andrew L. Freese, 50 IBLA 26, 87 I.D. 395 (1980). This conflicting treatment of millsites has, for the most part, been occasioned by an analysis of the relationship of a millsite claim to the specific provision of the mining laws involved. It is the context and purpose of the words "mining claims" in any statute that must determine whether or not millsites are intended to be included within its ambit.

Analysis of section 314(a) and (b) of FLPMA, 43 U.S.C. § 1744(a) and (b) (1976), clearly discloses an intent not to include millsite within the term "mining claim" as used in that section. In the first place, section 314(a), relating to proof of assessment work and notices of intention to hold, is directed to "the owner of an unpatented lode

or placer mining claim." Millsites, while they may in certain contexts be considered mining claims or mining locations, are neither lode nor placer in form, being limited by statute to no more than 5 acres. Then, too, in section 314(b), which relates to notices of location, Congress has clearly evinced a desire to differentiate among mining claims, millsites, and tunnel sites. Thus, the opening line of the provision makes specific reference to "an unpatented lode or placer mining claim or mill or tunnel site."

With reference to millsites and tunnel sites, therefore, we feel that the statute must be read as only requiring the filing of notices of location. But it is also clear that Departmental regulations require the filing of notices of intention to hold, see 43 CFR 3833.2-1(d), and it is undisputed that no such filing was made in the instant case in calendar year 1978. 3/ The question before us concerns the effect of such a failure to file, where the necessity for filing is determined by the regulations and not the statute.

We have noted in the past that there is a difference between the consequences which attend a failure to comply with a statutory

3/ That there was no statutory requirement for the filing of notices of intention to hold millsites was recognized in the adoption of the regulation requiring such filings. Thus, Assistant Secretary Martin noted: "One comment pointed out that the statute did not require the annual filing of a notice of intent to hold a mill or tunnel site and the requirement should be deleted. However, the section is needed so the Bureau can keep informed as to the status of sites and has been retained." 44 FR 9721 (Feb. 14, 1979).

recordation requirement and one which is purely regulatory. Thus, we have recognized that a failure to comply timely and scrupulously with the express statutory requirements cannot be waived by the Department. Lynn Keith, 53 IBLA 192, 88 I.D. 369 (1981). On the other hand, failure to comply promptly with those requirements based on purely regulatory language is subject to curative action. See Robert W. Hansen, 46 IBLA 93 (1980).

This approach has received judicial approbation in a recent decision by the Tenth Circuit Court of Appeals in Topaz Beryllium Co. v. United States, No. 79-2255 (filed May 21, 1981). Therein, the court reviewed the various provisions of both the statute and the regulations, and noted:

> We conclude that the Secretary has not ignored § 1744(c) which assumes that even defective filings put the Secretary on notice of a claim, and we hold that once on notice, the Secretary cannot deem a claim abandoned merely because the supplemental filings required only by § 3833 -- and not by the statute -- are not made. This is also the Secretary's view: failure to file the supplemental information is treated by the Secretary as a curable defect. A claimant who fails to file the supplemental information is notified and given thirty days in which to cure the defect. If the defect is not cured, "the filing will be rejected by an appealable decision." [Footnote omitted.]

Admittedly, the language of the court was primarily directed toward filings of notices of location, but we think the logic has equal applicability to the instant question. Accordingly, we hold that upon the failure of a millsite claimant to file an annual notice

of intention to hold, BLM should notify the claimant of this deficiency and afford the claimant a period of time in which to comply with the regulatory requirement. Should compliance not then occur, the millsite will properly be declared abandoned and void. We note that such a procedure both advances the Department's desire to be kept informed as to the status of claims on the public domain, and provides a mechanism for millsite owners to cure filing inadvertencies which might otherwise have proved fatal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case file remanded for further action not inconsistent herewith.

James L. Burski
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Bruce R. Harris
Administrative Judge